Pace Law Review

Volume 5
Issue 2 *Winter 1985*

Article 6

January 1985

In re Estate of Wilson: Judicial Reformation of Discriminatory Charitable Trusts

Carla Driansky Glassman

In re Estate of Wilson: Judicial Reformation of Discriminatory Charitable Trusts

I. Introduction

With few exceptions, every person has the right to dispose of his property as he chooses.[1] But any action the state takes to implement this right must not contravene the equal protection clause of the fourteenth amendment of the United States Constitution.[2] In a consolidated opinion, in *In re Estate of Wilson*,[3] the New York Court of Appeals held that judicial reformation of a discriminatory charitable trust was not action attributable to the state under the fourteenth amendment. In both cases, gender-restricted scholarships were established by testamentary

---

1. *See In re* Estate of Johnson, 93 A.D.2d 1, 20, 460 N.Y.S.2d 932, 944 (2d Dep't) (Niehoff, J., dissenting) *rev'd sub nom. In re* Estate of Wilson, 59 N.Y.2d 461, 452 N.E.2d 1228, 465 N.Y.S.2d 900 (1983). *See also In re* Girard College Trusteeship, 391 Pa. 434, 441, 138 A.2d 844, 847 *cert. denied sub nom.* Pennsylvania v. Board of Trusts, 357 U.S. 570 (1957); United States Nat'l Bank v. Snodgrass, 202 Or. 530, 275 P.2d 860, 864 (1954).

In certain instances, a person's freedom to dispose of his property may be limited by statutory or case law prohibitions. An example of a statutory limitation is a statute providing for a right of election by a surviving spouse; such a statute permits a surviving spouse to choose between taking the amount provided in the will, if any, or taking the "forced share" amount provided by the statute. *See, e.g.*, N.Y. EST. POWERS & TRUST LAW § 5-1.1(c)(1)(B) (McKinney 1981) (A surviving spouse has the right to elect to take one-third of the net estate if the decedent is survived by one or more issue; in all other cases, the elective share is one-half of the net estate.). Moreover, a person may not dispose of his property to achieve an immoral or illegal purpose, or violate public policy. *See, e.g., In re* Estate of Hutchins , 147 Misc. 462, 464, 263 N.Y.S. 896, 898 (Sur. Ct. Montgomery County 1933) (A condition in a will providing that the decedent's daughter could have the income from a trust fund only if she lived separate and apart from her husband was void as against public policy because it encouraged the breaking up of the family.).

2. U.S. CONST. amend. XIV, § 1 states in part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

3. 59 N.Y.2d 461, 452 N.E.2d 1228, 465 N.Y.S.2d 900 (1983). The court of appeals also decided *In re* Estate of Johnson, a factually similar case, in this consolidated opinion.

trusts,[4] and school board participation was required to select scholarship recipients.[5] In *Wilson*, the appellate court had used its *cy pres* power to eliminate participation by the school board.[6] In *In re Estate of Johnson*,[7] the companion case, the Surrogate had replaced the school board with a private trustee.[8]

The New York Court of Appeals reasoned that the Surrogates were merely applying neutral trust principles and that the trusts' discriminatory terms could not be fairly attributed to the state.[9] Although the decision stated that courts must not encourage, affirmatively promote, or compel discrimination,[10] *Wilson* may signal an increase in the degree of action a New York court may take before the equal protection clause is implicated.

Part II of this Note discusses the state action concept, with particular emphasis on judicial enforcement and reformation. It also examines the court's *cy pres* power and the countervailing constitutional principles governing an individual's freedom to discriminate in the disposition of his property. Part III presents the parallel factual backgrounds of the cases and the opinions of the surrogate's court, the appellate division, and the court of appeals. Part IV analyzes the reasoning of the court of appeals decision in the context of relevant constitutional and trust principles. Finally, Part V concludes that judicial modification that permits continuation of the discriminatory scheme of a private charitable trust is unconstitutional state action under the fourteenth amendment.

---

4. *Id.* at 468, 452 N.E.2d at 1231, 465 N.Y.S.2d at 903. The Wilson trust provided that income "be applied to defraying the education and other expenses of the first year at college of five (5) young men who shall have graduated from the Canastota High School." *Id.* at 469, 452 N.E.2d at 1231, 465 N.Y.S.2d at 903. The Johnson trust provided that income be used "for scholarships or grants for bright or deserving young men who have graduated from the High School of [The Croton-Harmon Union Free] School District. *Id.* at 470, 452 N.E.2d at 1231, 465 N.Y.S.2d at 903.

5. *Id.* at 469-70, 452 N.E.2d at 1231, 465 N.Y.S.2d at 903.

6. *In re* Estate of Wilson, 87 A.D.2d 98, 101, 451 N.Y.S.2d 891, 894 (3d Dep't 1982), *aff'd*, 59 N.Y.2d 461, 452 N.E.2d 1228 (1983).

7. *In re* Estate of Johnson, 108 Misc.2d 1066, 439 N.Y.S.2d 250 (Sur. Ct. Westchester County 1981), *rev'd*, 93 A.D.2d 1, 460 N.Y.S.2d 932, *rev'd sub nom. In re* Estate of Wilson, 59 N.Y.2d 461, 452 N.E.2d 1228, 465 N.Y.S.2d 900 (1983).

8. *Id.* at 1073, 439 N.Y.S.2d at 255.

9. *Wilson*, 59 N.Y.2d at 468, 452 N.E.2d at 1231, 465 N.Y.S.2d at 903.

10. *Id.* at 479-80, 452 N.E.2d at 1237, 465 N.Y.S.2d at 909.

II. Background

A. *State Action — Generally*

The state action concept is derived from the fourteenth amendment, which states in part that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[11] A state can deny equal protection of the laws by acting through its legislature,[12] its executive,[13] or its judicial authorities.[14] The equal protection proscription of the fourteenth amendment applies only to action by the states.[15] Discriminatory conduct by private citizens is not forbidden.[16]

Historically, state action was defined as that action taken in the name of the state, and for the state, which was clothed in the state's power.[17] Throughout the maze of state action litigation, the Supreme Court has refrained from establishing a formal test to identify state action.[18] Debate has flourished over the extent and the nature of the action that constitutes forbidden state action.[19] Individual cases have been decided on their indi-

---

11. U.S. CONST. amend. XIV, § 1.

12. *Ex parte* Virginia, 100 U.S. 339, 347 (1880).

13. *Id.*

14. *Id.* (A judge who restricted jury service to whites in contravention of a congressional act violated equal protection guarantees.). *See also* Virginia v. Rives, 100 U.S. 313, 318 (1880).

15. *See generally* Note, *Developments in the Law — Equal Protection*, 82 HARV. L. REV. 1065, 1069-72 (1969) (discussion of the types of state action necessary to invoke the equal protection clause). *See also* Bolling v. Sharpe, 347 U.S. 497 (1954). *Bolling* extended the equal protection requirements imposed on the states to the federal government by using a new interpretation of the fifth amendment due process clause. Twenty years later the Court stated that its "approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." Weinberger v. Weisenfeld, 420 U.S. 636, 638 n.2 (1975). For a general discussion of the application of equal protection principles to discriminatory action by the federal government, see Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C.L. REV. 541 (1977).

16. *See, e.g.*, Civil Rights Cases, 109 U.S. 3 (1883). These cases establish the requirement that state action is necessary to enable a person to bring a claim under the fourteenth amendment.

17. *See Ex parte* Virginia, 100 U.S. at 347.

18. Reitman v. Mulkey, 387 U.S. 369, 378 (1967).

19. *See generally* Barnett, *What Is "State" Action Under the Fourteenth, Fifteenth, and Nineteenth Amendments of the Constitution*? 24 OR. L. REV. 227 (1945) (Acts of public officers are "state" action only when officers act under state authority or under "color or pretense" of law.); Lewis, *The Meaning of State Action* 60 COLUM. L. REV. 1083 (1960) (Court must give shape to state action concept by considering the

vidual facts; the search for state action has involved "sifting facts and weighing circumstances."[20] In essence, the discriminatory conduct must be "fairly attributable to the state."[21]

Principal state action theories that have survived include the public function doctrine,[22] the state involvement theory,[23] the state encouragement theory,[24] and the judicial enforcement doctrine.[25] The Supreme Court has found state action under the public function doctrine when a private individual performs a public function that is ordinarily performed by the state.[26] State involvement occurs when the rights of a private party are violated by another private party in a situation in which the violation is attributable to the state.[27] The Court has found state en-

---

problems presented in each case; a rigid formula ignoring the facts should not be used.); Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208 (1957) (State action is present when the state gives legal effect to transactions between private persons.); Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3 (1961) (Strict formula for ascertaining state action should be avoided; facts for each case should be "sifted and weighed."); Williams, *The Twilight of State Action*, TEX. L. REV. 347 (1963) (State action analysis should be superseded by analysis to determine whether the state's constitutional interest in eliminating discrimination is outweighed by a private right to personal discrimination.).

20. *See* Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).

21. Lugar v. Edmonson Oil Co., 457 U.S. 922, 937 (1982).

22. *See, e.g.*, Marsh v. Alabama, 326 U.S. 501 (1946).

23. *See, e.g.*, Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

24. *See, e.g.*, Reitman v. Mulkey, 387 U.S. 369 (1967).

25. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1 (1948).

26. Marsh v. Alabama, 326 U.S. 501 (1946) (Streets of a privately owned company town were equated with city streets, and the town's owner was prohibited from banning freedom of expression in the streets.). *See also* Evans v. Newton, 382 U.S. 296 (1966) (A private park which had formerly been a public park providing "municipal" type services maintained its municipal character, and therefore could not exclude blacks.); Terry v. Adams, 345 U.S. 461 (1953) (A private political association that conducted primary elections could not exclude blacks because the elections were considered a public function).

In the 1970's, the Court limited the public function doctrine to those functions that were traditionally performed exclusively by the government. *See, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (Supplying utility service was not traditionally an exclusive state function.); Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978) (Warehouseman's sale of stored goods in satisfaction of a lien he obtained under state law was not state action because the resolution of private disputes was traditionally not an exclusively governmental function.).

27. *See, e.g.*, Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (State parking authority was recognized as a joint participant in discrimination because it leased space in one of its buildings to a coffee shop that refused to serve blacks.).

State involvement may be direct, such as when a law is enacted mandating segregation. Peterson v. City of Greenville, 373 U.S. 244, 247-48 (1963). The state involvement

couragement of private discrimination in a state constitutional provision that repealed existing state laws banning discrimination.[28] Finally, judicial enforcement of private discrimination occurs when an individual is deprived of a right because a court has used its power to enforce private discriminatory behavior.[29]

B. *Judicial Enforcement as State Action*

1. Shelley v. Kraemer

When the Supreme Court decided *Shelley v. Kraemer*[30] in 1948, it confirmed the principle that actions of state courts and of judges acting in their official capacities constitute state action.[31] In *Shelley*, a restrictive covenant among a group of white homeowners forbade any of them from selling their homes to "any person not of the Caucasian race."[32] Shelley, a Negro, purchased a piece of the restricted property.[33] Owners of other property subject to the restrictive covenant brought suit, seeking to restrain Shelley from taking possession and seeking to divest

---

can also be indirect, such as when private citizens caused Negroes to be arrested by falsifying reports that the Negroes had committed crimes. United States v. Guest, 383 U.S. 745, 755-56 (1966). State involvement includes state responsibility, which follows from "state participation through any arrangement, management, funds or property." Cooper v. Aaron, 358 U.S. 1, 4 (1958). If a standard exists, it is probably that the conduct, which is presumably causing the infringement of a federal right, must be "fairly attributable to the state." Lugar v. Edmonson Oil Co., 457 U.S. at 937.

28. Reitman v. Mulkey, 387 U.S. 369 (1967) (The ultimate effect of the state constitutional provision was that it permitted or encouraged private individuals to discriminate in the sale or lease of their property.). *See also* Griffen v. Maryland, 378 U.S. 130 (1964) (A private park employee was appointed as deputy sheriff so that he could arrest black trespassers in a private amusement park.); Adickes v. Kress & Co., 398 U.S. 144 (1970) (State custom of not offering restaurant service to racially mixed groups was encouraged by police harassment of a patron who deviated from the custom.); Griffen v. County School Board, 377 U.S. 218 (1964) (State granted financial aid to racially discriminatory private schools.). *But cf.* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). In *Moose Lodge*, the mere grant of a liquor license to a private club that discriminates was not a state action. *Id.* at 177. If, however, the state had required the lodge's compliance with discriminatory provisions in its own by-laws, state action would have been present.). *Id.* at 178-79.

29. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1 (1948); *see also infra* notes 30-41 and accompanying text.

30. 334 U.S. 1 (1948)

31. *Id.* at 14.

32. *Id.* at 4-5.

33. *Id.*

him of title.[34]

The Supreme Court concluded that because there was no constitutional bar to private discrimination, the covenant itself violated no constitutionally guaranteed freedom.[35] But the Court held that judicial enforcement of private discriminatory agreements was forbidden by the fourteenth amendment.[36] The Court noted that freedom from discrimination by the states in the enjoyment of property rights is a major objective of the fourteenth amendment[37] and reasoned that the equal protection clause may be invoked when court enforcement of the covenant is sought.[38] The Court further observed that the fourteenth amendment is not rendered ineffective "simply because the particular pattern of discrimination, which the state has enforced, was defined initially by the terms of a private agreement. State action . . . for the purposes of the Fourteenth Amendment, refers to the exertion of state power in all its forms."[39] The state court's action in *Shelley* was not a case of simple abstention that would have left private citizens free to practice private discrimination.[40] If not for the active intervention of the state courts, Shelley would have been free to purchase his property without restraint.[41]

The Supreme Court applied the *Shelley* rationale in *Barrows v. Jackson*.[42] In *Barrows*, the Court held that judicial enforcement is impermissible state action when a state court

---

34. *Id.* at 6. The Supreme Court noted that the trial court denied the relief sought on the ground that the restrictive covenant had never become final. (At the time the covenant was made, it was the parties' intention that the covenant not become effective until all property owners in the district signed. This never happened.) *Id.*

Sitting en banc, the Supreme Court of Missouri reversed the trial court and directed that the relief sought by the covenantors be granted. The court held that the covenant was effective and that its enforcement was constitutional. Kraemer v. Shelley, 355 Mo. 814, 198 S.W.2d 679 (1946).

35. Shelley v. Kraemer, 334 U.S. at 13.

36. *Id.* at 20.

37. *Id.* at 10.

38. *Id.* at 20. For a discussion of the countervailing constitutional rights of liberty and equality in *Shelley*, see Henkin, Shelley v. Kraemer: *Notes for a Revised Opinion* 110 U. PA. L. REV. 473 (1962).

39. Shelley v. Kraemer, 334 U.S. at 20. If, on the other hand, the purpose of the covenants were effectuated by voluntary adherence, there would have been no action by the state, and the fourteenth amendment would not have been violated. *Id.* at 13.

40. *Id.* at 19.

41. *Id.*

42. 346 U.S. 249 (1953).

awards damages against a landowner who breaches a racially restrictive real estate covenant.[43] The Court reasoned that when damages are awarded, the continued enforcement of the covenant is no longer a matter of individual action.[44] The award against the breaching covenantor rendered non-Caucasions unable to purchase and own property on the same terms as Caucasians and deprived them of equal protection of the laws in violation of the fourteenth amendment.[45] The Court concluded that the Constitution grants no individual the right to demand action by the state that results in the denial of equal protection of the law to other individuals.[46]

2. *The* Girard Will Case

In *Pennsylvania v. Brown*,[47] a case factually similar to *In re Estate of Johnson*,[48] the Third Circuit Court of Appeals held that a state court's substitution of private trustees for state trustees who were legally unable to administer a school for "poor white male orphans" was unconstitutional state action.[49] The court based its decision on *Shelley* and concluded that state involvement was the obvious net consequence of substituting the trustees.[50]

Brown was the culmination of more than a decade of litigation stemming from the *Girard Will Case*.[51]

---

43. *Id.* at 254. The parties were owners of residential real estate in the same neighborhood in Los Angeles, California. Their covenant stated that the property should never be used or occupied by non-Caucasians. The covenant was to run with the land and the restrictions were to be incorporated in all transfer papers. Respondent broke the covenant (1) by conveying her real estate without incorporating the restriction in the deed and (2) by allowing non-Caucasians to move in and occupy the premises. *Id.* at 251-52.

44. *Id.* at 254.

45. *Id.*

46. *Id.* at 260 (quoting Shelley v. Kraemer, 334 U.S. at 22).

47. 392 F.2d 120 (3d Cir.), *cert. denied*, 391 U.S. 921 (1968).

48. 108 Misc. 2d 1066, 439 N.Y.S. 2d 250 (Sur. Ct. Westchester County 1981), *rev'd*, 93 A.D.2d 1, 460 N.Y.S.2d 932 (2d Dep't), *rev'd sub nom. In re* Estate of Wilson, 59 N.Y.2d 461, 452 N.E.2d 1228, 465 N.Y.S.2d 900 (1983).

49. Pennsylvania v. Brown, 392 F.2d at 120.

50. *Id.* at 124-25.

51. Girard Estate, 4 Pa. D. & C.2d 671 (Orphans' Ct. Phila. County 1955), *aff'd*, 386 Pa. 548, 127 A.2d 287 (1956), *rev'd sub nom.*, Pennyslvania v. Board of Directors, 353 U.S. 230 (1957). In his will, Stephen Girard left a large sum of money in trust to the city of Philadelphia to establish a school for "poor white male orphans." *Id.* at 675. In 1869, a local board of trusts was established to administer the school. *Id.* at 678. In 1954, two

Previously, in 1957, the United States Supreme Court held that the administration of a discriminatory trust by a state agency is unconstitutional even when the discrimination is pursuant to a private bequest.[52] Thus, the Court concluded that the administration of the Girard trust was unconstitutional because the trustee was a state agency and the refusal to admit two boys was based on race.[53]

On remand, the orphans' court replaced the state agency with a private trustee.[54] The Pennsylvania Supreme Court upheld the constitutionality of the court's replacement, concluding that an individual has a right to have his lawful bequest judicially respected and enforced.[55] The court further concluded that *Shelley* was distinguishable because (1) blacks had no right to be beneficiaries under the Girard will,[56] and (2) replacement was appropriate as it would be in any situation in which a trustee could no longer serve.[57]

The black children then instituted a federal class action.[58] The Third Circuit Court of Appeals affirmed the district court in

---

otherwise qualified black children were refused admission to the school because of the bequest's racial restriction. The boys petitioned the orphans' court for an order directing the Board to admit them, arguing that their exclusion because of race violated the fourteenth amendment. The orphans' court rejected the constitutional argument and refused to order the applicants' admission. *Id.* at 719-21. For discussions of the Girard litigation, see Clark, *Charitable Trusts, the Fourteenth Amendment and the Will of Stephan Girard*, 66 YALE L.J. 979 (1957); Shanks, *"State Action" and the Girard Estate Case*, 105 U. PA. L. REV. 213 (1956).

52. Pennsylvania v. Board of Directors, 353 U.S. 230 (1957).

53. *Id.* at 231.

54. Girard Estate, 7 Pa. Fiduc. 552, 558-59 (Orphans' Ct. Phila. County 1957). After the Supreme Court decision, the Pennsylvania legislature enacted a statute granting the orphans' court the power and duty to appoint substitute trustees for the property of minors when a previous trustee which was a political subdivision was removed "in the public interest." Act of Nov. 19, 1959, No. 538, 1959 Pa. Laws 1526.

55. Girard College Trusteeship, 391 Pa. 434, 138 A.2d 844, *cert. denied sub nom.* Pennsylvania v. Board of Trusts, 357 U.S. 570 (1958).

56. *Id.* at 451, 138 A.2d at 851.

57. *Id.* at 455, 138 A.2d at 853.

58. Pennsylvania v. Brown, 270 F. Supp. 782 (E.D. Pa. 1967), *aff'd*, 392 F.2d 120 (3d Cir.), *cert. denied*, 391 U.S. 921 (1968). The black children claimed that their continued exclusion from Girard College by the newly appointed trustees was constitutionally impermissible. The class action was initially brought by seven black male orphans suing on behalf of themselves and all others similarly situated. They were joined by the Commonwealth of Pennsylvania, the Attorney General of the Commonwealth, and the city of Philadelphia. The defendants were the newly appointed trustees of the Girard Estate.

upholding the children's claim.[59] A concurring opinion stated that by choosing to remove the Board of Trusts as trustee, the orphans' court "significantly involved itself with invidious discrimination"[60] and brought itself within the *Shelley* doctrine.[61]

---

59. Pennsylvania v. Brown, 392 F.2d 120 (3d Cir. 1968), *aff'g* 270 F. Supp. 782 (E.D. Pa. 1967), *cert. denied*, 391 U.S. 921 (1968). The district court upheld the boys' claim, reasoning that the immediate transfer of the trusteeship to private individuals by the orphans' court failed to effectively disassociate the state from the discrimination practiced when the state operated the school. Pennsylvania v. Brown, 270 F. Supp. at 790.

60. Pennsylvania v. Brown, 392 F.2d at 127 (Kalodner, J., concurring) (quoting Reitman v. Mulkey, 387 U.S. 369, 380 (1967). On invidious discrimination, the Supreme Court has said that to examine the constitutionality of a state act the reviewing court must (1) consider the act "in terms of its immediate objective, its ultimate effect and its historical context and the conditions existing prior to its enactment" and (2) "assess the potential impact of official action in determining whether the State has significantly involved itself with invidious discriminations." Reitman v. Mulkey, 387 U.S. 369, 373, 380 (1967).

61. Pennsylvania v. Brown, 392 F.2d at 127 (Kalodner, J., concurring).

In the wake of *Shelley* and *Brown*, state courts have continued to find impermissible state action where there has been judicial involvement with private racial discrimination, including the judicial supervision and enforcement of a discriminatory charitable trust. *In re* Will of Potter, 275 A.2d 574, 583 (Del. Ch. 1970); Milford Trust Co. v. Stabler, 301 A.2d 534, 536 (Del. Ch. 1973); Bank of Delaware v. Buckson, 255 A.2d 710, 715 (Del. Ch. 1969). A federal court has refused to instruct trustees to implement discriminatory provisions of a racially restricted trust because the advice was held to be the equivalent of judicial state action. Guillory v. Administrators of Tulane Univ., 212 F. Supp. 674, 687 (E.D. La. 1962). Courts, however, have not readily extended the *Shelley* judicial enforcement doctrine to the gender discrimination context. *See* United States Jaycees v. Philadelphia Jaycees, 639 F.2d 134, 145 (3d Cir. 1981); Girard v. 94th St. & Fifth Ave. Corp., 530 F.2d 66, 69 (2d Cir.), *cert. denied*, 425 U.S. 974 (1976). Although courts have indicated that state action would be present if a substantial relationship existed between court enforcement and private sex discrimination, they have declined to find a substantial relationship in circumstances in which a court's only participation involved providing a disinterested forum. *See* United States Jaycees v. Philadelphia Jaycees, 639 F.2d at 145 (finding no substantial relationship between court enforcement of the Lanham Trade-Mark Act and gender discriminatory practices of the national organization even though the local chapter's charter was terminated by the national organization for violation of the national's discriminatory practices); Girard v. 94th St. & Fifth Ave. Corp., 530 F.2d at 69 (holding a court judgment enforcing a lease provision that was gender neutral on its face was not substantially related to purported gender discrimination).

The United States Supreme Court has stated that state action exists when the state courts apply a rule of law, whether statutory or not, to award a judgment in a civil action. *See* New York Times v. Sullivan, 376 U.S. 254, 265 (1964) (Action was attributable to state court only *after* it had rendered a final judgment on the merits of a libel suit.). *But see* Henry v. First Nat'l Bank, 444 F.2d 1300, 1309 (5th Cir. 1971), *cert. denied*, 405 U.S. 1019 (1972) (no state action on part of state court merely because private civil tort action was filed); Skolnick v. Martin, 317 F.2d 855 (7th Cir.), *cert. denied*, 375 U.S. 908 (1963) (no state action in civil litigation where state court did no more than furnish a forum and had no interest in outcome). The Court has also found state action in a case

C. *Cy Pres*

1. *Generally*

Cy pres, which literally means "as near,"[62] is a judicial mechanism for the preservation of charitable trusts, which permits a court to revise a charitable trust in order to meet unforeseen emergencies or changed circumstances that threaten the trust's existence.[63] For a court to use its *cy pres* power, a settlor must have manifested a general charitable intent.[64] General charitable intent is present when there is evidence that although the settlor intended that his property be applied to a specific charitable purpose, he had a more general intention to devote that property to charitable purposes.[65] If there is evidence of a general charitable intent and if the settlor's original purpose becomes impossible, impracticable, or illegal, a court uses its *cy pres* power to reform trust provisions so that the settlor's charitable intent may be implemented as closely as possible.[66] Thus,

---

where state courts enforced state common law policy. *Cf.* American Fed'n of Labor v. Swing, 312 U.S. 321 (1941) (Judicial enforcement of common law policy restraining peaceful picketing interfered with the constitutional guarantee of freedom of discussion.).

Other courts have concluded that state action occurs when a state court grants an injunction, *see* Machesky v. Bizzell, 414 F.2d 283, 286 (5th Cir. 1969), and when a judicial preference is substituted for a testator's intent in a will construction proceeding. *In re* Will of Hoffman, 53 A.D.2d 55, 66, 385 N.Y.S.2d 49, 56 (1st Dep't 1976) (construing the word "issue" to exclude illegitimate children).

62. G. BOGERT, TRUSTS & TRUSTEES § 431 (rev. 2d ed. 1977). Historically, *cy pres* was used by the King of England as *parens patriae* to direct trust property toward whatever charitable purpose he chose. Adams, *Racial and Religious Discrimination in Charitable Trusts: A Current Analysis of Constitutional and Trust Law Solutions*, 25 CLEV. ST. L. REV. 1, 23 (1976). It was the king's prerogative to use *cy pres* arbitrarily. *Id.* He had no duty to ascertain a charitable purpose that was in accord with the donor's original intent. *Id.* The concept of judicial *cy pres* developed concurrently and was used in cases in which there was a blanket gift to charity. *Id.* at 23-24. Early American case law accepted judicial *cy pres*. *Id.* at 24.

63. Weaver Trust, 43 Pa. D. & C.2d 245, 250 (1967). *See generally* G. BOGERT, *supra* note 62, §§ 431-442; IV A. SCOTT, LAW OF TRUSTS §§ 395-401 (3d ed. 1967); RESTATEMENT (SECOND) OF TRUSTS § 399 (1959); E. FISCH, THE CY PRES DOCTRINE IN THE UNITED STATES (1950).

64. A. SCOTT, ABRIDGEMENT OF THE LAW OF TRUSTS, § 399 (1960).

65. *Id.*

66. First Nat'l Bank & Trust Co. v. First Nat'l Bank & Trust Co., 35 Del Ch. 449, 454, 121 A.2d 296, 299 (1956) (quoting RESTATEMENT (SECOND) OF TRUSTS § 399 (1959)); *In re* Will of Lee, 3 Misc. 2d 1072, 1079, 156 N.Y.S.2d 813, 822 (Sup. Ct., N.Y. County 1956).

state courts have used *cy pres* to eliminate discrimination in charitable trusts that violated the fourteenth amendment because state action was required to accomplish the trust's purposes.[67] Courts have deleted discriminatory restrictions regarding race,[68] religion,[69] national origin,[70] and sex.[71] It is

---

Cy pres may be used to apply a trust corpus to a charitable purpose that satisfies the settlor's general charitable intent. *In re* Will of Shatford, 18 Misc. 2d 953, 188 N.Y.S.2d 411 (Sur. Ct. Columbia County 1959) (Where testator had manifested general charitable intent to benefit the town, the court used *cy pres* to authorize building an indoor swimming pool because funds left by testator were insufficient to build a park and an outdoor pool as specified in the will.); *In re* Will of Hendricks, 1 Misc. 2d 904, 148 N.Y.S.2d 245, (Sup. Ct. Onondaga County 1955), *aff'd.*, 3 A.D.2d 890, 161 N.Y.S.2d 855 (4th Dep't 1957), *aff'd.* 4 N.Y.2d 744, 148 N.E.2d 911, 171 N.Y.S.2d 863 (1958) (Where testator had manifested general charitable intent to benefit medical and surgical research but the private university to which the funds had been endowed determined that it was no longer economically feasible to continue operation, the court used *cy pres* to authorize payment of trust income to the state university that acquired the private medical school.). But see *In re* Will of Heffron, 3 N.Y.2d 665, 148 N.E.2d 671, 171 N.Y.S.2d 545 (1958) (*Cy pres* doctrine held inapplicable where private medical school conveyed its facilities to state university, and testator had made clear his intention to benefit humanity exclusively through the private medical school.).

67. *See In re* Crichfield Trust, 177 N.J. Super. 258, 426 A.2d 88 (Super. Ct. Ch. Div. 1980); *In re* Will of Potter, 275 A.2d 574 (Del. Ch. 1970); Dunbar v. Board of Trustees, 170 Colo. 327, 461 P.2d 28 (1969).

68. *See, e.g.*, Wooten v. Fitz-Gerald, 440 S.W.2d 719 (Tex. Civ. App. 1969). In *Fitz-Gerald* a trust was established to create a home for *aged white men.* The court deleted the word *white*, calling it an unenforceable word. *Id.* at 725; *See also* Coffee v. Rice University, 408 S.W.2d 269 (Tex. Civ. App. 1966). In *Coffee*, the court determined, at the request of the trustees, that the donor's primary intent was to create a greater center of learning. When it became convinced that this was not possible so long as the discrimination remained, the court used *cy pres* to eliminate a founder's racial restriction on University admissions. *Id.* at 286.

69. *See, e.g.*, Howard Sav. Inst. v. Peep, 34 N.J. 494, 170 A.2d 39 (1961). In *Howard*, the court used *cy pres* to eliminate the Protestant-Gentile restriction for scholarship recipients, thereby giving effect to the testator's primary intent to benefit Amherst College. *Id.* at 509-10, 170 A.2d at 47-48.

70. *See, e.g., In re* Estate of Hawley, 32 Misc. 2d 624, 223 N.Y.S.2d 803 (Sur. Ct., N.Y. County 1961). In *Hawley*, the court used *cy pres* to excise the conditions that prize recipients at the Trinity School in New York be Protestants "in good standing" and sons of native-born Americans. The student body had changed over time. Since there was no longer a significant number of applicants who met the original religious and national origin requirements, the court reasoned that the testator's primary intent was to benefit the school. *Id.* at 628, 223 N.Y.S.2d at 808.

71. *See, e.g., In re* Crichfield Trust, 177 N.J. Super. 258, 426 A.2d 88 (Super. Ct. Ch. Div. 1980). In *Crichfield*, the trust was originally for the benefit of "worthy boys of Summit High School." The court applied *cy pres* and eliminated the sex-based classification, reasoning that it was adapting to circumstances unforeseen by the testatrix when the trust was established in 1932. At that time few female graduates went to college and the

unnecessary that the precise terms of the trust become illegal or impossible to implement; courts have used *cy pres* even in circumstances in which the testator's precise instructions were merely impracticable.[72]

In contrast, if the settlor manifested no general charitable intent, the trust fails if its original purpose becomes illegal, impossible, or impracticable.[73] *Cy pres* is inapplicable in these situations.[74] *Cy pres* may not be used to vary the terms of a bequest merely to suit the desire or convenience of the trustee.[75] Nor may it be used when the testator has provided for a gift-over[76] to other charitable purposes to take effect upon a finding that

---

testatrix probably predicted neither the change in the number of women seeking higher education nor the growth of public policy against sex discrimination. *Id.* at 261-62, 426 A.2d at 89-90. *See also* Long Estate, 5 Pa. D. & C.3d 602, 618 (1978). In *Long*, a trust for "respectable white women" discriminated on the basis of sex and race. The court changed the words "white women" to "persons." *But see In re* Will of Cram, 186 Mont. 37, 44-45, 606 P.2d 145, 150 (1980) (eliminating public organizations from participation in the mechanics of a gender discriminatory trust, instead of eliminating the gender restriction).

72. *See, e.g.*, Dunbar v. Board of Trustees, 170 Colo. 327, 334, 461 P.2d 28, 32 (1969). (Charitable intent of testator whose 1899 will established a school for the care and training of poor, white, male orphans, aged six through ten, was best served by extending admission to children regardless of color, aged six through eighteen, who were deprived of parental care or support.); *cf.* Lutheran Hosp. v. Goldstein, 182 Misc. 913, 46 N.Y.S.2d 705 (Sup. Ct. N.Y. County 1944) (Testatrix's charitable intent that income, but not principal, be used to provide free hospital beds for the poor at Lutheran Hospital of Manhattan was best served by donating trust income to another hospital, which was financially sound, instead of invading corpus to support the financially troubled Lutheran Hospital.).

73. *See* Evans v. Abney, 396 U.S. 435 (1970). Senator Bacon had provided for a city-run park to be used exclusively by whites. In his will, he had mentioned his belief that whites and blacks should not mix for recreational purposes. The Georgia court held that because the park could no longer be operated on a segregated basis, the trust had failed and the property should revert to Senator Bacon's heirs. *Id.* at 447. *See also* LaFond v. Detroit, 357 Mich. 362, 98 N.W.2d 530 (1959) (Trust was permitted to fail where testatrix had provided for a "playfield for white children" and the will stated that it "be carried out to the letter.").

74. *See, e.g.*, Evans v. Abney, 396 U.S. 435 (1970). (Cy pres held inapplicable because the racial restriction was an essential, inseparable part of Senator Bacon's plan).

75. *See* Connecticut College v. United States, 276 F.2d 491, 497 (D.C. Cir. 1960). Testatrix bequeathed funds to United States Military Academy for construction of a memorial building in a certain location. The Academy wanted to put the building elsewhere. The court reasoned that the Academy's refusal to apply the funds as prescribed by the testator was not due to circumstances beyond the Academy's control.

76. A gift-over is an alternative bequest that takes effect if a trust is unable to operate, or if, by its terms, a trust violates the law. Connecticut Bank & Trust Co. v. Johnson Memorial Hosp., 30 Conn. Supp. 1, 9, 294 A.2d 586, 591 (Super. Ct. 1972).

the trust violates the law.[77] The provision for a gift-over negates the existence of a general charitable intent just as the absence of such a provision is evidence of a general charitable intent.[78]

2. Cy pres *Distinguished from Deviation*

Cy pres differs from deviation, a closely related equitable principle that permits a variation of trust terms in circumstances in which the trust would otherwise be defeated or seriously impaired.[79] The *cy pres* power, which is exercisable only by the court, allows a shift to a similar charitable purpose or a change in the class of beneficiaries.[80] Deviation authorizes a court to grant trustees the power to make changes in a trust's administration, but not changes in its purposes or beneficiaries.[81]

It is a state court's responsibility to decide whether *cy pres* or deviation should be applied to any particular charitable trust.[82] There is no discernible pattern to predict whether a state court will apply *cy pres* to a given discriminatory trust provision.

3. Cy Pres *and Discriminatory Scholarships*

State courts have generally used their *cy pres* power to delete discriminatory provisions in charitable trusts establishing scholarships in situations in which effectuation of a trust became

---

77. *Id.*

78. *See* G. BOGERT *supra* note 62, § 437 (rev. 2d ed. 1977).

79. *See* Connecticut Bank & Trust Co. v. Johnson Memorial Hosp., 30 Conn. Supp. at 9, 294 A.2d at 591. *See generally* IV A. SCOTT, *supra* note 63, § 381; RESTATEMENT *supra* note 63, § 381.

80. Connecticut Bank & Trust Co. v. Johnson Memorial Hosp., 30 Conn. Supp. at 9, 294 A.2d at 591.

81. *Id.* Deviation did not authorize elimination of bequest's racial restriction to caucasions because it did not permit enlarging the class of beneficiaries to include persons the testatrix intended to exclude. *Id.* Because the testatrix provided for a gift-over to her residuary estate in the event that the trust became inoperable, the court declined to find general charitable intent and held that *cy pres* was inapplicable. The trust was allowed to fail. *Id. See also* Bank of Delaware v. Buckson, 255 A.2d 710, 715 (Del. Ch. 1969) (Court used deviation to instruct trustee and scholarship committee consisting of the high school principal, the Chief Justice of the State and a bank president to accept scholarship applications from nonwhites.).

82. *See* Evans v. Abney, 396 U.S. at 447.

impossible.[83] In Connecticut, the supreme court removed racial and gender restrictions from a scholarship trust, but left religious restrictions intact.[84] The court reasoned that the testator had manifested more concern with the religious restrictions than with the racial or gender restrictions.[85] The dissent argued that by removing only two of the three discriminatory restrictions the court had clearly involved the state in sanctioning and enforcing private discrimination.[86]

In Massachusetts, the supreme judicial court ordered a private bank acting as the trustee of a public charitable trust to accept applications for law school scholarships without regard to gender restrictions.[87] The court reasoned that the testator, who directed that the fund "be used to aid . . . worthy and ambitious young men to acquire a legal education,"[88] had used the word "men" in its generic sense, which included women.[89]

The Delaware Courts of Chancery have deleted racial restrictions from scholarship trusts.[90] In *Bank of Delaware v. Buckson*,[91] the court refused to advise the trustee to reject applications from nonwhites because it concluded that this advice was tantamount to state enforced discrimination.[92] In addition, the court found state action because the committee to evaluate the scholarship applicants consisted of state officials.[93]

---

83. *See* Adams, *Racial and Religious Discrimination in Charitable Trusts: A Current Analysis of Constitutional and Trust Solutions*, 25 CLEV. ST. L. REV. 1, 13-19 (1976).

84. Lockwood v. Killian, 179 Conn. 62, 425 A.2d 909 (1979).

85. *Id.* at 69, 425 A.2d at 913.

86. *Id.* at 73, 425 A.2d at 914 (Bogdanski, J., dissenting).

87. *See* Ebitz v. Pioneer Nat'l Bank, 372 Mass. 207, 361 N.E. 2d 225 (1977).

88. *Id.* at 209, 361 N.E.2d at 226.

89. *Id.* at 211, 361 N.E.2d at 227.

90. Bank of Delaware v. Buckson, 255 A.2d 710 (Del Ch. 1969); Milford Trust Co. v. Stabler, 301 A.2d 534 (Del. Ch. 1973). For a similar treatment in federal court, see Wachovia Bank v. Buchanan, 346 F. Supp. 665 (D.D.C. 1972), *aff'd*, 487 F.2d 1214 (D.C. Cir. 1973).

91. 255 A.2d 710 (Del. Ch. 1969).

92. *Id.* at 715. In *Buckson* a testamentary trust established in 1917 provided for an annual college scholarship to be awarded to a white male graduate of Wilmington High School. The testator expressed a general concern for the well being, prosperity and stability of the Wilmington community. *Id.* at 711-12.

93. *Id.* at 717. The court noted that since the will had been drafted, circumstances had changed substantially, with an enormous shift in the schools' racial population. *Id.* at 714. *See also* Milford Trust Co. v. Stabler, 301 A.2d 534 (Del. Ch. 1973) (The court

Most recently, a New Jersey appellate court eliminated a gender-based restriction on a scholarship trust that had been administered by the local board of education for fifty years.[94] The court concluded that it had become impossible for the board to administer the trust because restrictive provisions violated the board's policies against discrimination.[95]

In contrast, some state courts have declined to use *cy pres* in similar circumstances because they found no unconstitutional state action.[96] The Missouri Supreme Court held that no state action was involved when the testator established a sex-restricted scholarship at a university which was private at the time the trust was established, but which subsequently became part of the state university.[97] The court concluded that although the university was involved in the administration of the private trust, the university's involvement was not so pervasive or extensive as to constitute state action.[98] The court relied on the fact that the private trustee had the ultimate power of selection.[99]

Similarly, a district court in Pennsylvania found *cy pres* inapplicable when a racially restrictive scholarship trust required college officials to certify the eligibility of applicants to a private

---

found unlawful state action in the administration of a racially restrictive scholarship trust because the selection committee consisted of persons who held positions in state educational administration and the committee received information from the school district through its principals and teachers.).

94. *In re* Crichfield Trust, 177 N.J. Super. 258, 426 A.2d 88 (Super. Ct. Ch. Div. 1980).

95. *Id.* at 261-62, 426 A.2d at 89-90.

96. *See, e.g.*, Shapiro v. Columbia Union Nat'l Bank, 576 S.W.2d 310 (Mo. 1978), *cert. denied*, 444 U.S. 831 (1979).

97. *Id.* at 320.

98. *Id.* According to the court, the university merely participated in the selection process by disseminating information about the scholarship in its catalog, accepting and processing applications in its financial aid office, determining academic standards and financial needs, making "tentative awards," and forwarding names of qualified male students to the private trustees who, in turn, had the final power to select scholarship recipients. *Id.*

99. *Id.* at 321. A dissent argued that for all practical purposes the university was selecting the scholarship recipients, and therefore, the selections were state action. *Id.* at 323 (Simeone, J., concurring and dissenting). Justice Simeone would not have used *cy pres* to substitute the neutral word "students" for the word "boy," rather, he would have applied the doctrine of deviation to remove the university from its participation in the scholarship's administration. *Id.* at 323-24.

trustee.[100] The college petitioned for removal of the racial restriction, which was contrary to its policy.[101] The court declined to delete the racial restriction because the "white" eligibility criterion could be literally and lawfully carried out without certification by the college officials.[102]

D. *Countervailing Principles: Freedom to Discriminate vs. Equal Protection*

Balanced against the fourteenth amendment's equal protection guarantees are the constitutionally protected countervailing rights of liberty and privacy.[103] Included among these protected rights is the freedom to discriminate, which "the Constitution prefers over the victim's claim to equality, and which the state may be constitutionally permitted — if not required — to support by judicial remedy."[104] In *Shelley v. Kraemer*,[105] the Supreme Court addressed the question of whether judicial enforcement of a private discriminatory agreement constituted state action. The Court concluded that although there was no proscription against the covenant itself, any court action required for enforcement was impermissible state action.[106]

The protected freedom to discriminate includes the right of an individual to bequeath his property to whomever he chooses.[107] But the right to discriminate in the free disposition of one's property is less than absolute.[108] It is well settled that courts will not administer testamentary provisions designed to further immoral or illegal purposes.[109] Moreover, the right to

---

100. *Weaver Trust*, 43 Pa. D. & C.2d 245 (1967).

101. *Id.* at 247.

102. *Id.* at 254.

103. *See* Henkin, *supra* note 38, at 487 (1962). The facts in *Shelley* clearly illustrate these countervailing rights. The Shelleys sought equality to take possession of property and enjoy home ownership to the same extent as others without regard to racial prejudice. The Kraemers sought liberty to contract freely and thus choose their neighbors. *Id.* at 488.

104. *Id.*

105. 334 U.S. 1 (1948).

106. *Id.* at 13-14.

107. *In re* Estate of Johnson, 93 A.D.2d at 9, 460 N.Y.S.2d at 938.

108. *Id.*

109. *See, e.g., In re* Hughes, 225 A.D. 29, 30-31, 232 N.Y.S. 84, 86 (4th Dep't 1928), *aff'd sub nom. In re* Kelley, 251 N.Y. 529, 168 N.E. 415 (1929).

dispose of property in a discriminatory manner may not enlist substantial state participation.[110]

Bequest cases present a particularly difficult problem because no will can be probated, and thus given effect, without court action. If a probate court's actions in probating a will were attributable to the state as state action no discriminatory testamentary bequest could ever be effectuated. Because discriminatory provisions are commonly present in testamentary schemes, a testator's right to dispose of his property according to his wishes would be severely impaired, if not abrogated.[111] In each case, the question that must be answered is whether the state's role provides sufficient sanction and encouragement to the private discrimination to make the state responsible for that discrimination.[112] Ministerial or neutral acts, such as probating a will or substituting one private trustee for another, do not constitute state action for equal protection purposes.[113] A ministerial act is one that is performed in accordance with uniform procedures and involves no discretion on the part of the person performing it.[114] Moreover, a ministerial act may be performed by a judge or by clerical personnel.[115] But when a judge or other employee exercises his discretion, the act is no longer a ministerial act; it becomes instead a judicial or quasi-judicial act.[116]

III. The Cases

A. In re Estate of Wilson

Clark Wilson's will provided that his residuary estate be held in trust with the income applied each year toward defraying the first year college expenses of five "young men" who graduated from Canastota High School.[117] The will required the superintendent of the school district to certify the candidates'

110. *In re* Estate of Johnson, 93 A.D.2d at 9, 460 N.Y.S.2d at 938.

111. *See* Henkin, *supra* note 38, at 499-500.

112. *Id.* at 499.

113. *See In re* Estate of Johnson, 93 A.D.2d at 15, 460 N.Y.S.2d at 942.

114. Tango v. Tulevech, 61 N.Y.2d 34, 459 N.E.2d 182, 186, 471 N.Y.S.2d 73, 77 (1983).

115. *See id.*

116. *See id.*

117. *In re* Estate of Wilson, 59 N.Y.2d 461, 469, 452 N.E.2d 1228, 1231, 465 N.Y.S.2d 900, 903 (1983).

grades to the trustee bank.[118]

In 1981, after the Wilson trust had been administered without incident for eleven years,[119] the Civil Rights Office of the United States Department of Education received a complaint alleging that the superintendent's certification of the candidates' grades violated title IX of the Education Amendment of 1972, which prohibits gender discrimination in any educational program or activity receiving federal financial assistance.[120] To avoid the potential loss of federal funds and the possibility of prosecution for violation of title IX, the school district agreed to refrain from further certification of student grades to the trustee.[121]

Unable to administer the trust, the trustee bank initiated a proceeding in June, 1981 to determine the effect and validity of the trust provisions under the will.[122] The Surrogate ordered the trustee to continue administration of the trust in all respects.[123]

The appellate division, third department, unanimously concluded that the school district's voluntary refusal to certify the students' names to the trustee rendered the administration of the trust according to its literal terms impossible.[124] The court used its *cy pres* power to strike the clause in the will requiring the superintendent's certification of the candidates,[125] and the

---

118. *In re* Estate of Wilson, 87 A.D.2d 98, 99, 451 N.Y.S.2d 891, 892 (3d Dep't 1982) *aff'd*, 59 N.Y.2d 461, 452 N.E.2d 1228 (1983). Three of the candidates were to have attained the highest grades in science; the other two were to have attained the highest grades in chemistry. *Id.* Wilson's will further provided that the number of high school science awards should be reduced according to the number, if any, of Canastota graduates enrolled in accredited medical schools. Each enrolled medical student was to receive an award that would otherwise have gone to a high school student. *Id.* It is interesting to note that there was no gender restriction for the medical scholarships, which have been awarded to both men and women. Record at 38, *In re* Estate of Wilson, 87 A.D.2d 98, 451 N.Y.S.2d 891 (3d Dep't 1982) (No. 42058).

119. *Wilson*, 59 N.Y.2d at 469, 452 N.E.2d at 1231, 465 N.Y.S.2d at 903.

120. *Id.* (citing Education Amendments of 1972, tit. IX, 20 U.S.C. § 1681(a) (1982)).

121. *Wilson*, 59 N.Y.2d at 469, 452 N.E.2d at 1231, 465 N.Y.S.2d at 903.

122. *Id.*

123. *In re* Estate of Wilson, No. 81-21676 (N.Y. Sur. Ct. Madison County Oct. 23, 1981). The court held that the school district's participation by providing grades to the trustee was a purely ministerial function and did not give rise to a fourteenth amendment violation. *Id.* at 19. The court further said that the language in the Wilson will was clear and unambiguous, and required no judicial construction. *Id.* at 20.

124. *In re* Estate of Wilson, 87 A.D.2d at 101, 451 N.Y.S.2d at 893 (3d Dep't 1982).

125. *Id.* at 102, 451 N.Y.S.2d at 894.

court substituted a provision that permitted qualified students to apply directly to the trustee.[126]

B. In re Estate of Johnson

By a testamentary trust, Edwin Johnson created a gender restricted scholarship fund to provide scholarships for "bright and deserving young men who have graduated from the high school of the [Croton-Harmon Union Free] School District, and whose parents are financially unable to send them to college."[127] The Croton-Harmon Board of Education was named as trustee. With the assistance of the high school principal, the school board was to select scholarship recipients.[128]

Before any scholarships were awarded, a female student at the high school claimed a right to scholarship eligibility.[129] The National Organization of Women filed a complaint with the Civil Rights Office of the United States Department of Education addressing the scholarship's gender restrictions.[130] The school board refrained from awarding any scholarships because it did not want to jeopardize its receipt of federal funds, and the executrix of Mr. Johnson's estate subsequently brought an accounting proceeding in surrogate's court.[131] The Attorney General of the State of New York, as statutory representative of the indefinite and ultimate charitable beneficiaries, also petitioned the court to delete the word "men" and substitute the word "persons."[132]

The Surrogate ordered that the school board be replaced by

---

126. *Id.* Although the appellants urged the court to apply its *cy pres* power to eliminate the gender restrictions in Mr. Wilson's will, the court reasoned that its power over the disposition of other people's assets was limited to the removal of restrictions only if they were inconsistent with the testator's dominant purpose. The appellate division reiterated that the court must use *cy pres* to carry out the testator's original purpose as closely as possible.

127. *In re* Estate of Johnson, 108 Misc. 2d 1066, 1067, 439 N.Y.S.2d 250, 251 (Sur. Ct. Westchester County 1981), *rev'd*, 93 A.D.2d 1, 460 N.Y.S.2d 932 (2d Dep't), *rev'd sub nom.* In re Estate of Wilson, 59 N.Y.2d 461, 452 N.E.2d 1228, 465 N.Y.S.2d 900 (1983).

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 1066-67, 439 N.Y.S.2d at 251.

132. *Id.* at 1068, 439 N.Y.S.2d at 252.

a private trustee,[133] because the board's unwillingness to administer the trust according to its terms rendered the trust impossible.[134] Furthermore, the Surrogate specified that the private trustee could consider recommendations made by the school board or the high school principal.[135]

A divided appellate division, second department, reversed the surrogate's court and held that under the equal protection clause of the fourteenth amendment, the court could not reform a trust that by its own terms would deny equal protection of the laws.[136] The court said that the Surrogate's substitution of a private trustee was "inconsistent with the purposes and principles of the fourteenth amendment."[137] The appellate division used its *cy pres* power to make the trust gender neutral.[138]

The court distinguished the Surrogate's judicial reformation in this case from the "largely ministerial and neutral judicial acts" of probating a will containing a discriminatory bequest or of substituting one private trustee for another private trustee to administer a discriminatory trust.[139] The court characterized the Surrogate's substitution of a private trustee as "breathing life" into a discriminatory provision that was invalid at its inception because of state involvement.[140] The appellate division cited evidence that Mr. Johnson viewed the school district's role as es-

---

133. *Id.* at 1073, 439 N.Y.S.2d at 255.

134. *Id.* The court cited Pennsylvania v. Brown, 392 F.2d 120 (3d Cir.), *cert. denied*, 391 U.S. 921 (1968), for the proposition that the mere supervision or appointment of trustees by a probate court did not amount to prohibited state entanglement, because there was abolutely no history of any direct state involvement. *In re* Estate of Johnson, 108 Misc. 2d at 1072, 439 N.Y.S.2d at 254. The Surrogate distinguished the facts in *Johnson* from those in *Brown* and Evans v. Newton, 382 U.S. 296 (1966), where there had been a long history of state and municipal involvement prior to the court's appointment of private trustees. *Id.*

135. *In re* Estate of Johnson, 108 Misc. 2d at 1073, 439 N.Y.S.2d at 255.

136. *In re* Estate of Johnson, 93 A.D.2d 1, 15, 460 N.Y.S.2d 932, 942 (2d Dep't), *rev'd sub nom. In re* Estate of Wilson, 59 N.Y.2d 461, 452 N.E.2d 1228, 465 N.Y.S.2d 900 (1983).

137. *Id.* at 12, 460 N.Y.S.2d at 940. The appellate division said that although reformation of the trust was appropriate, the Surrogate had used his power incorrectly by substituting the private trustee. The preferable option would have been to delete the gender restriction. *Id.* at 8-9, 460 N.Y.S.2d at 938.

138. *Id.* at 16, 460 N.Y.S.2d at 942.

139. *Id.* at 15, 460 N.Y.S.2d at 941-42.

140. *Id.* at 19, 460 N.Y.S.2d at 942.

sential to the selection process.[141] Finally, the court noted that in the 1961 and 1974 versions of his will, Mr. Johnson attached no gender restrictions to alternate scholarships to be awarded if his specific bequests become impractical.[142]

C. *The Court of Appeals Decision*

1. *The Majority*

In a six to one decision, the court of appeals reversed the appellate division in *Johnson* and unanimously affirmed the order of the appellate division in *Wilson*.[143] The court held that judicial reformation of these trusts did not violate the equal protection clause of the fourteenth amendment.[144] Writing for the majority, Chief Justice Cooke acknowledged that the court's exercise of its power over trusts could constitute state action within the meaning of the fourteenth amendment,[145] but he emphasized that "a trust's discriminatory terms are not fairly attributable to the State when a court applies trust principles that permit private discrimination but do not encourage, affirma-

---

141. *Id.* at 16-17, 460 N.Y.S.2d at 942-43. The court said it was clear that the school district's function was more than that of a mere conduit, because the school was in the best position to select deserving recipients for the scholarships. *Id.* Without the school district's recommendations, which the Surrogate had held permissible, the selection process would be seriously impaired. *Id.* All of this essential activity would be unconstitutional state action.

142. *Id.* at 17, 460 N.Y.S. 2d at 943. In contrast, the dissent found no unconstitutional state action. *Id.* at 25, 460 N.Y.S.2d at 947 (Niehoff, J., dissenting). At worst, Mr. Johnson had chosen an inappropriate trustee. *Id.* at 26, 460 N.Y.S.2d at 948. The dissent viewed the majority's elimination of the gender restriction in Mr. Johnson's will as an "unprecedented assault upon the freedom of every individual, *man or woman* . . . to dispose of *his or her* private property as *he or she* sees fit." *Id.* at 23-24, 460 N.Y.S.2d at 946. The crux of Justice Niehoff's argument is that if a Surrogate can substitute one private trustee for another to administer a discriminatory trust without being guilty of unconstitutional state action, he should similarly be able to substitute a private trustee for a public agency trustee without being guilty of unconstitutional state action. *Id.* at 26, 460 N.Y.S.2d at 948. The judicial action - the substitution of a trustee - is identical in each case. In each case, the Surrogate assisted the testator by implementing his discriminatory purpose. *Id.* at 27, 460 N.Y.S.2d at 948.

143. *In re* Estate of Wilson, 59 N.Y.2d 46, 452 N.E.2d 1228, 465 N.Y.S.2d 900 (1983), *aff'g* 87 A.D.2d 98, 451 N.Y.S.2d 891 (3d Dep't 1982), *rev'g sub nom. In re* Estate of Johnson, 93 A.D.2d 1, 460 N.Y.S.2d 932 (2d Dep't 1983). Chief Judge Cooke and Judges Jasen, Jones, Wachtel, and Simons formed the majority; Judge Meyer dissented.

144. *Id.* at 479, 452 N.E.2d at 1237, 465 N.Y.S.2d at 909.

145. *Id.*

tively promote, or compel it."[146]

The court reasoned that the accomplishment of the testators' specific charitable intent had not been rendered "impossible or impracticable."[147] Provided the high schools graduated male students, the testators' intent to provide for the educational expenses of male graduates could be fulfilled.[148] The court indicated that it was not exercising its *cy pres* power,[149] but rather its general equitable power over all trusts to permit the deviation from the administrative terms of the trust so that a successor trustee could be appointed.[150] According to New York law, a testamentary trust will not fail for want of a trustee.[151]

After discussing the standards by which state action is measured and evaluated, Justice Cooke concluded that recourse to the courts in *Wilson* was solely for the purpose of administering the trusts and not for the enforcement of their discriminatory provisions.[152] The court stated that the replacement of the unwilling trustee in *Johnson* and the deviation from the administrative trust term in *Wilson* were accomplished by court powers that extended to all trusts.[153] The court action did not compel discrimination.[154] Furthermore, the state participation in the trusts' administration was minimal and did not cause the trusts to take on an "indelible public character."[155]

The court reiterated that the fourteenth amendment does not mandate that the state exercise the full extent of its power to eliminate all private discrimination.[156] The court concluded that such discrimination falls within the ambit of the fourteenth amendment only when the state itself discriminates, when it compels another to discriminate, or when it allows another to

---

146. *Id.* at 479-80, 452 N.E.2d at 1237, 465 N.Y.S.2d at 909.

147. *Id.* at 472, 452 N.E.2d at 1233, 465 N.Y.S.2d at 905.

148. *Id.*

149. *Id.* at 475, 452 N.E.2d at 1234, 465 N.Y.S.2d at 906.

150. *Id.*

151. "[I]f no person is named as trustee, title vests in the court having jurisdiction over the trust." N.Y. EST. POWERS & TRUSTS LAW § 8-1.1(a) (McKinney 1967). The court may fill the vacancy. N.Y. SURR. CT. PROC. ACT § 1502(1) (McKinney 1967).

152. *Wilson*, 59 N.Y.2d at 479, 452 N.E.2d at 1237, 465 N.Y.S.2d at 909.

153. *Id.* at 480, 452 N.E.2d at 1237, 465 N.Y.S.2d at 909.

154. *Id.*

155. *Id.*

156. *Id.*

discriminate while assuming a state function.[157]

2. *The Dissent*

Judge Meyer, dissenting in part, agreed with the majority in affirming *Wilson*, but would also have affirmed the appellate division decision in *Johnson*.[158] Judge Meyer observed that in *Wilson* the trust was private and that the only public involvement was the certification of student grades by the school superintendent. Because that information was available to the students, there was no state action involved in the court's deletion of the certification requirement.[159] In *Johnson*, however, the discriminatory trust had a public trustee, and this difference made it unconstitutional state action for the court to legitimize the trust by appointing a private trustee.[160]

IV. Analysis

In *In re Estate of Wilson*, the court of appeals concluded that the elimination of the superintendent's certification in *Wilson*, and the substitution of a private trustee in *Johnson* did not constitute unconstitutional state action, because in each case the discrimination was not fairly attributable to the state.[161] Although acknowledging that the court's exercise of its power over trusts was subject to the fourteenth amendment's equal protection requirements,[162] the court of appeals maintained that the modifications in these cases neither encouraged, affirmatively promoted, nor compelled private discrimination.[163]

The court of appeals attempted, but failed, to distinguish adequately the actions it took in *Wilson* from the state court's enforcement of the restrictive covenants in *Shelley v. Kraemer*.[164] The court observed that in *Shelley* it was not the neutral regulation, but rather the court enforcement of contracts that

157. *Id.*

158. *Id.* at 480, 452 N.E.2d at 1238, 465 N.Y.S.2d at 910 (Meyer, J., dissenting).

159. *Id.* at 480-81, 452 N.E.2d at 1238, 465 N.Y.S.2d at 910.

160. *Id.* at 481, 452 N.E.2d at 1238, 465 N.Y.S.2d at 910.

161. *In re* Estate of Wilson, 59 N.Y.2d 461, 479, 452 N.E.2d 1228, 1237, 465 N.Y.S.2d 900, 909 (1983).

162. *Id.*.

163. *Id.* at 479-80, 452 N.E.2d at 1237, 465 N.Y.S.2d at 909.

164. 334 U.S. 1 (1948).

caused the discrimination to be attributable to the state.[165] In *Shelley*, however, the Supreme Court noted that since the adoption of the fourteenth amendment, the Court had consistently held that the actions of state courts and state judicial officials constituted state action within the meaning of the fourteenth amendment.[166] But without recourse to the courts for enforcement in *Shelley* and for modification in *Wilson*, the private discrimination could not be implemented.

The court of appeals stated that in *Wilson* the coercive power of the state was never "enlisted to enforce private discrimination."[167] Instead, the court's construction and reformation powers were used to interpret and modify the trust terms.[168] The powers invoked and the trust principles applied extended to all trusts, regardless of their purposes.[169]

Similarly, the court of appeals failed to distinguish *Pennsylvania v. Brown* adequately.[170] In *Brown*, the Third Circuit Court of Appeals held that the state court's replacement of the trustees, which allowed private discrimination to continue, was unconstitutional state action.[171] The New York Court of Appeals maintained that the cases were distinguishable because the state participation in *Wilson* before the trusts reached the courts for construction was minimal compared with the state participation in *Brown*.[172] The court indicated that in *Brown*, the trust had taken on an "indelible public character,"[173] presumably because

---

165. *Wilson*, 59 N.Y.2d at 478, 452 N.E.2d at 1236, 465 N.Y.S.2d at 908.

166. Shelley v. Kraemer, 334 U.S. at 18.

167. *Wilson*, 59 N.Y.2d at 479, 452 N.E.2d at 1237, 465 N.Y.S.2d at 909.

168. *Id.* at 479-80, 452 N.E.2d at 1237, 465 N.Y.S.2d at 909.

169. *Id.* There is no argument with the well-cited proposition that discrimination by an otherwise private entity does not violate the equal protection clause simply because the entity receives a service or benefit from the state, or because it is subject to state regulation. If the rule were different, even a purely private entity would be unable to exercise its freedom to discriminate, because every entity is subject to some form of state regulation or is the recipient of some purely ministerial state service.

170. 392 F.2d 120 (3d Cir.), *cert. denied*, 391 U.S. 921 (1968). *Brown* addressed the same issue as *Johnson*. In *Brown*, the state court substituted private trustees for state trustees who were no longer legally permitted to carry out racially discriminatory provisions as administrators of Girard College. *Id.* at 122. *See supra* notes 47-61 and accompanying text.

171. *Id.* at 120.

172. *Wilson*, 59 N.Y.2d at 480, 452 N.E.2d at 1237, 465 N.Y.S.2d at 909.

173. *Id.*

the state had administered the Girard College trust for more than 125 years.[174] But it is the character of the court action, not the character of the trust that determines the existence of state action in this context. The state courts' actions in *Brown* and *Johnson* were identical. If judicial intervention, allowing a discriminatory trust to continue, is unconstitutional state action in one case, the same judicial intervention is unconstitutional state action in the second case.

The court of appeals declined to use its *cy pres* power to eliminate the gender restrictions in *Wilson*.[175] The court concluded that the gender restrictions of the trusts did not frustrate the testators' paramount charitable purposes.[176] Instead, the court used the equitable principle of deviation to alter the administrative terms in *Wilson* and to appoint a successor trustee in *Johnson*.[177]

The court based its actions on its conclusion that the testators' primary intent was to finance a portion of the boys' college educations and not to benefit the school districts directly.[178] But the court offered no evidence to support its conclusion, and there is at least some evidence in each case that the testators intended to benefit the school districts.[179] Thus, it seems inappropriate for the court to attempt to distinguish *Wilson* from cases in which state courts use *cy pres* to eliminate discriminatory restrictions on scholarships to permit trusts to continue.[180]

---

174. Pennsylvania v. Brown, 392 F.2d at 120.

175. *Wilson*, 59 N.Y.2d at 474, 452 N.E.2d at 1234, 465 N.Y.S.2d at 906.

176. *Id.*

177. *Id.* at 475, 452 N.E.2d at 1234, 465 N.Y.S.2d at 906.

178. *Id.* at 474, 452 N.E.2d at 1234, 465 N.Y.S.2d at 906.

179. In 1961, Mr. Johnson had executed a will leaving his residuary estate in trust for Columbia University to be used for scholarships for young men from the Croton Harmon school district who attended Columbia. When Columbia expressed dissatisfaction, Mr. Johnson's attorney replied that his client's interest in the school district was greater than his interest in Columbia. Brief for the Attorney General-Respondent at 25, *In re* Estate of Johnson, 59 N.Y.2d 461, 452 N.E.2d 1228, 465 N.Y.S.2d 900 (1983). It is possible that the gender restriction in Mr. Johnson's will was the residual effect of a time when Columbia was still all male. Mr. Wilson's will provided that medical school scholarships for graduates of Canastota High School take precedence over college scholarships for male graduates. The medical school scholarships had no gender restrictions. *See supra* note 118.

180. *See Wilson*, 59 N.Y.2d at 474, 452 N.E.2d at 1234, 465 N.Y.S.2d at 906. The court discussed Howard Sav. Inst. v. Peep, 34 N.J. 494, 170 A.2d 39 (1961) and cited *In re* Estate of Hawley, 32 Misc. 2d 624, 223 N.Y.S.2d 803 (Sur. Ct. N.Y. County 1961),

In each case cited, the state court found that the testator's primary intent was to benefit the educational institution.[181] Here, given at least some evidence that Mr. Wilson and Mr. Johnson intended to benefit the respective school districts, the cases cited by the court of appeals seem analogous rather than distinguishable.

The court further asserted that it was merely applying neutral trust principles when it applied the doctrine of deviation in *Wilson*.[182] *Cy pres* is also a neutral trust principle. The court could easily have followed the apparent trend of other state courts to use *cy pres* to eliminate the discriminatory gender restrictions. By choosing to apply the trust law that perpetuated, rather than eliminated, the discrimination, the court in effect placed its imprimatur on that discrimination.

Mr. Wilson and Mr. Johnson had the legal right to bequeath their property with discriminatory provisions. But they could not do so in a way that enlisted the substantial participation of the state to accomplish their discriminatory purposes. The court of appeals held that neither the judicial modification of the administrative terms in *Wilson* nor the replacement of the trustee in *Johnson* constituted substantial participation.[183] Although admitting a will to probate cannot be considered substantial participation by the state because it involves largely ministerial acts,[184] neither the act in *Wilson* nor the act in *Johnson* was merely ministerial. In each case, the judge used his discretion and performed the distinctly judicial functions of construing the testators' intent, and finding and applying the relevant law. Thus, when a testator's intent is unclear and the state is involved in the administration of a discriminatory trust, judicial modification of the trust constitutes state action and arguably violates the fourteenth amendment. Furthermore, "[t]he claim that private discrimination is constitutionally protected must give way to the no less legitimate claim that the state is constitutionally prohibited from engaging in discriminatory conduct or

---

Coffee v. Rice Univ., 408 S.W.2d 269 (Tex. Civ. App. 1966). *See also supra* notes 68-70.

181. Howard Sav. Inst. v. Peep, 34 N.J. at 506, 170 A.2d at 45; *In re* Estate of Hawley, 32 Misc. 2d at 624, 223 N.Y.S.2d at 804; Coffee v. Rice Univ., 408 S.W.2d at 275.

182. *See In re* Wilson, 50 N.Y.2d at 480, 452 N.E.2d at 1237, 465 N.Y.S.2d at 909.

183. *Id.*

184. *See supra* text accompanying notes 114-16.

encouraging private parties to discriminate."[185]

V. Conclusion

The New York Court of Appeals held in *In re Estate of Wilson*,[186] that judicial reformation of discriminatory charitable trusts was not unconstitutional state action. By so holding, it became the court's choice that the discriminatory trusts continue. Although the judicial reformation in *Wilson* neither compelled nor affirmatively promoted private discrimination, it appears to have encouraged it by permitting its continuation.

The court's holding was more than neutral administration. Future testators wishing to establish discriminatory charitable trusts will assume, based on this decision, that when necessary, the court will use its equitable powers to preserve discriminatory provisions of a trust that fails because of state involvement.

There were sufficient facts in *Wilson* to justify the court's use of *cy pres* to delete the gender restrictions. This action would have signalled private philanthropists to scrupulously avoid involving a public body in their discriminatory schemes. But the court chose not to do this. Rather, it chose to apply those trust principles that excised the public involvement and allowed the discriminatory provisions to prevail. Judicial modification that perpetuates a discriminatory scheme in a private charitable trust is no less state action than judicial enforcement of a private covenant.

Carla Driansky Glassman

185. Lockwood v. Killian, 179 Conn. 62, 75, 425 A.2d 909, 915 (1979) (Bogdanski, J., dissenting).

186. 59 N.Y.2d 461, 452 N.E.2d 1228, 465 N.Y.S.2d 900 (1983).